85-1448

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, MICHAEL SCIARRA, President, JOSEPH SHERIDAN, Vice-President, JOSEPHINE PROVENZANO, Sec-Treasurer, STANLEY JARONKO, Trustee, and JOSEPH SHERIDAN, JOSEPHINE PROVENZANO, MICHAEL SCIARRA, STANLEY JARONKO,

Petitioners (Appellants Below),

v.

UNITED STATES OF AMERICA,

Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "preponderance of the evidence" standard of proof is sufficient to sustain a verdict in a civil action brought pursuant to the Racketeer Influenced and Corrupt Organization Act [RICO], 18 U.S.C. § 1961 *et seq.*, a question left open by this Court in *Sedima, S.P.R.L. v. Imrex Company, Inc., et al.*, 473 U.S. ____, 87 L.Ed.2d 346, 105 S.Ct. 3291 (1985).

2. Whether the alleged extortion of intangible rights guaranteed to union members by the Labor Management Reporting and Disclosure Act [LMRDA], "Bill of Rights," 29 U.S.C. § 411, constitutes a violation of the Hobbs Act, 18 U.S.C. § 1951, and thus a chargeable predicate offense under RICO.

3. Whether union officers' lawful appointment of convicted felons to union office, in compliance with the then-applicable provision of LMRDA, 29 U.S.C. § 504, can constitute a violation of the Hobbs Act, 18 U.S.C. § 1951.

4. Whether union officers' violation (*arguendo*) of LMRDA, 29 U.S.C. § 501(a), in failing to take affirmative action to suspend the union's payments of accrued salary and/or pension bonus monies to an individual convicted of union-related crimes, can constitute a violation of the Hobbs Act, 18 U.S.C. § 1951.

PARTIES

The parties to this action in the United States Court of Appeals for the Third Circuit were Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Salvatore Provenzano, President (and individually), Joseph Sheridan, Vice-President (and individually), Josephine Provenzano [Septembre], Sec-Treasurer (and individually), J.W. Dildine, Recording Secretary (and individually), Thomas Reynolds, Sr., Trustee (and individually), Stanley Jaronko, Trustee (and individually); Trucking Employees of North Jersey Welfare Fund, Inc., Salvatore Provenzano, Employee Trustee; Local 560 Officers and Employees Severance Pay Plan, Salvatore Provenzano, Trustee and Administrator, Josephine P. Septembre, Trustee and Administrator; Anthony Provenzano, individually; Nunzio Provenzano, individually; Stephen Andretta, individually; Thomas Andretta, individually; Gabriel Briguglio, individually; and Michael Sciarra, individually (and as Trustee of Local 560, although not so denominated), appellants below; United States of America, appellee below.

The petitioners on this petition for writ of certiorari are Local 560 and its four remaining Executive Board members, Michael Sciarra, former Trustee, now President, Joseph Sheridan, Vice-President, Josephine Provenzano, Sec-Treasurer, and Stanley Jaronko, Trustee.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINIONS IN COURTS BELOW 1

GROUNDS OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 3

STATEMENT OF THE CASE 3

ARGUMENT 10

CONCLUSION 27

APPENDIX (Separately Bound)

TABLE OF AUTHORITIES

Cases:

Page

Addington v. Texas,
441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) 12-13

Herman & MacLean v. Huddleston,
459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) 14

Haroco, Inc. v. American Nat'l Bank & Trust Co.,
747 F.2d 384 (7th Cir. 1984), *aff'd,* ____ U.S. ____,
105 S.Ct. 3291, 87 L.Ed.2d 437 (1985) 10

McNamara v. Johnston,
522 F.2d 1157 (7th Cir. 1975), *cert. denied,*
425 U.S. 911 (1976) 25

Page

Preiser v. Rodriguez,
411 U.S. 475 (1973) 23

Russello v. U.S.,
464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) 11

Santosky v. Kramer,
455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) 14

S.E.C. v. C.M. Joiner Leasing Corp.,
320 U.S. 344, 64 S.Ct. 120, 88 L.Ed.2d 88 (1943) 14

Sedima, S.P.R.L. v. Imrex Company, Inc., et al.,
741 F.2d 482 (2d Cir. 1984), *rev'd,* 473 U.S. ____,
87 L.Ed.2d 346, 105 S.Ct. 3291 (1985) ..... i, 11, 12, 14, 16

Simpson v. U.S.,
345 U.S. 6 (1978) 23

Steadman v. Securities and Exchange Comm'n,
450 U.S. 91, 101 S.Ct. 999, 67 L.Ed. 69 (1981) 14

Tomko v. Hilbert,
288 F.2d 625 (3rd Cir. 1961) 18

U.S. v. Allman,
609 F.2d 298 (7th Cir. 1979), *cert. denied,*
445 U.S. 946 (1980) 20

U.S. v. Anderson,
626 F.2d 1358 (8th Cir. 1980), *cert. denied,*
450 U.S. 912 (1981) 21

U.S. v. Bates,
429 F.2d 557 (9th Cir. 1970) 23

U.S. v. Bertucci,
333 F.2d 292 (3rd Cir.), *cert. denied,*
379 U.S. 839 (1964) 18

Page

U.S. v. Black,
759 F.2d 71 (D.C. Cir. 1985) 21

U.S. v. Boylan,
20 F.2d 359 (2d Cir.), cert. denied,
449 U.S. 833 (1980) 20

U.S. v. Cappetto,
502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S.
925, 95 S.Ct. 1121, 43 L.Ed.2d 395 (1975) 11, 16

U.S. v. Dean,
647 F.2d 779 (8th Cir. 1981), *cert. denied*, 456 US.
1006 (1982) 20

U.S. v. Greenleaf,
692 F.2d 182 (1st Cir. 1982), *cert. denied, sub nom*
Bratton v. U.S., 460 U.S. 1069 (1983) and *Greenleaf*
v. U.S., 460 U.S. 1069 (1983) 20

U.S. v. Hawkins,
658 F.2d 279 (5th Cir. 1981) 20

U.S. v. Kelly,
545 F.2d 619 (8th Cir. 1976), *cert. denied*,
430 U.S. 933 (1977) 18

U.S. v. Local 560, etc., et al.,
550 F.Supp. 511 (D.N.J. 1982) 2, 19

U.S. v. Local 560, Int'l Bhd. of Teamsters, Chauffeurs,
Warehousemen, and Helpers of North America, et al.,
581 F.Supp. 279 (D.N.J. 1984) 2, 18

U.S. v. Local 560 of the Int'l Bhd. of Teamsters,
Chauffeurs, Warehousemen, and Helpers of
America, et al.,
780 F.2d 267 (3rd Cir. 1985) 2, 19

U.S. v. Malizia,
720 F.2d 744 (2d Cir. 1983) 18

Page

U.S. v. Regan,
232 U.S. 37, 34 S.Ct. 213, 58 L.Ed.2d 494 (1914) 14

U.S. v. Roganovich,
318 F.2d 167 (7th Cir.), *cert. denied,* 375
U.S. 911 (1963) 18

U.S. v. Rone,
598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom*
Little v. U.S.,
445 U.S. 946 (1980) 21

U.S. v. Snyder,
668 F.2d 686 (2nd Cir. 1982) 26

U.S. v. Sutton,
700 F.2d 1078 (6th Cir. 1983) 20

U.S. v. Truglio,
731 F.2d 1123 (4th Cir.), *cert. denied,* ____ U.S.
____, 105 S.Ct. 197 (1984) 20

U.S. v. Williams,
624 F.2d 75 (9th Cir. 1980) 18

Vance v. Terrazas,
444 U.S. 252 (1980) 14

Winer v. Edison Brothers Stones Pension Plan,
593 F.2d 307 (8th Cir. 1979) 25

Statutes:

18 U.S.C. §2 ..... 3, 8

18 U.S.C. §1951 ..... i, 5, 19, 20

18 U.S.C. §1962(4) 15

18 U.S.C. §1962(a)-(d) 3, 5, 17

28 U.S.C. §1254 2

Page

29 U.S.C. §411(a)(1) and (2) ..... i, 3, 5

29 U.S.C. §501(a) ..... i, 3, 10, 18

29 U.S.C. §504 ..... i, 3, 9

Miscellaneous:

Blakey & Goldstock, *"On the Waterfront:" RICO and Labor Racketeering,* 17 Am.Crim.L.Rev. 341 (1980) 20

1 K. Brickley, Corporate Criminal Liability § 7:01 (1984) 11

Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO,* The National Law Journal, Oct. 10, 1983 ..... 11, 16

Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970,* 83 Yale L.J. 1491 (1974) 20

Rodonich v. House Wreckers Union, Civ. No. 82-5583 (S.D.N.Y., Nov. 7, 1986) (available Feb. 25, 1986, on WESTLAW, QDCT file) 19

Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest; Everybody's Darling,* 19 Am.Crim.L.Rev. 655 (1982) 10, 11, 16

Tarlow, *RICO: THe New Darling of Prosecutor's Nursery,* 49 Fordham L.Rev. 165 (1980) 21

Towers, *Burden of Proof in RICO Actions: Does 'Sedima' Provide Guidance?* The National Law Journal, Dec. 2, 1985 ..... 10, 11-12, 16

IN THE

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OCTOBER TERM, 1985

No. 85-

LOCAL 560 of the International Brotherhood
of Teamsters, Chauffeurs, Warehousemen
and Helpers of America,
MICHAEL SCIARRA, President,
JOSEPH SHERIDAN, Vice-President,
JOSEPHINE PROVENZANO, Sec-Treasurer,
STANLEY JARONKO, Trustee,
and
JOSEPH SHERIDAN,
JOSEPHINE PROVENZANO,
MICHAEL SCIARRA,
STANLEY JARONKO,
Petitioners (Appellants Below),

v.

UNITED STATES OF AMERICA,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS IN COURTS BELOW

The opinion of the United States District Court for the District of New Jersey, denying petitioners' motion for dismissal of paragraph 12(a) of the Complaint for failure

to state a cause of action, is reported at *U.S. v. Local 560, etc. et al.*, 550 F. Supp. 511 (D.N.J. 1982) (App. A).

The opinion of the United States District Court for the District of New Jersey, with findings of fact and conclusions of law following a 51-day bench trial, is reported at *U.S. v. Local 560, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, et al.*, 581 F. Supp. 279 (D.N.J. 1984) (App. B).

The opinion of the United States Court of Appeals for the Third Circuit, affirming the verdict and judgment of the District Court, is reported at *U.S. v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, et al.*, 780 F.2d 267 (3rd Cir. 1985) (App. D).

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit in this case was dated and entered December 26, 1985.

The order of the United States Court of Appeals for the Third Circuit in this case, denying petition for rehearing (with suggestion for rehearing *en banc*), was dated and entered January 23, 1986.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1254, to review the judgment of the Court of Appeals, by writ of certiorari granted upon timely petition of a party to a civil action, after rendering of judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES

Title 18, United States Code, Section 2

Title 18, United States Code, Section 1962(a)-(d)

Title 29, United States Code, Section 411(a)(1) & (2)

Title 29, United States Code, Section 501(a)

Title 29, United States Code, Section 504

These statutes are set forth in their entirety at Appendix I, as provided in S.C.R. 21.1(f).

STATEMENT OF THE CASE

In this unique case, the United States sought, and won, the ouster of the entire Executive Board of Local 560 of the International Brotherhood of Teamsters, the relief granted by the District Court on its finding that the union's members have been extorted of their LMRDA rights and are fearful of their past and/or present leaders. Not one single union member was called in the United States' case in chief to give testimony, evidence or opinions concerning this ultimate issue of fact or the desirability of the court's remedy. Instead, the United States presented evidence of illegal activities on the part of *past* union officers, newspaper articles to prove the past officers' bad reputation (later ruled inadmissible by the Court of Appeals), the testimony of a Special Agent of the Department of Labor concerning his interviews of undisclosed confidential informants (also ruled inadmissible by the Court of Appeals), and the testimony of an expert in the field of labor law that it was "incomprehensible" to him that the union members were not fearful – a lay psychiatric opinion which carried the day. This expert's opinion, it

should be noted, was based on little more than his reading of the Complaint and his speculation concerning union members' expected reactions to past officers' criminal convictions, in view of the Court of Appeals' rulings concerning the newspaper articles and the special agent's testimony. (At trial the expert relied heavily upon his assumptions concerning the reputations of the Provenzano Group members, which assumptions were no longer based on any evidence at all.)

This case began with the filing of a verified complaint by the United States on March 19, 1982, predicated upon the Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. § 1961 *et seq.* The named defendants were Local 560 of the International Brotherhood of Teamsters together with its Executive Board members; its Pension and Welfare Fund (Trucking Employees of North Jersey Welfare Fund Inc.); its Officer & Employee Severance Pay Plan; five persons comprising part of the so-called "Provenzano Group," Anthony and Nunzio Provenzano being former presidents of the Local, Stephen Andretta being a former business agent, Thomas Andretta and Gabriel Briguglio having never held any office or position with Local 560; and all of the Executive Board members individually.

The complaint alleged that Anthony Provenzano was the leader of the Provenzano Group, which included at various times the defendants specified above as well as other individuals, all now incarcerated, dead, or long gone from the union. None of the Executive Board members of Local 560 were alleged to be members of the Provenano Group. The Complaint alleged that the Provenzano Group, beginning in the late 1950's, had "infiltrated, dominated and exploited" Local 560, which together with its Severance Pay Plan and Welfare Fund Plan were

denominated the "Local 560 Enterprise," thereby rendering it a "captive labor organization."

Paragraph 12(a) of the Complaint charged that the Provenzano Group, as principals, "aided and abetted at various times by past and present members of the Executive Board," unlawfully acquired and maintained an interest in and control of the Local 560 Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(b). Twenty-five [later twenty-eight] separate acts were listed which were claimed to constitute extortionate acts inducing the members of Local 560 to surrender their LMRDA rights, 29 U.S.C. § 411(a)(1) & (2). These extortionate acts were charged as Hobbs Act violations, 18 U.S.C. § 1951.

Paragraph 12(b) of the Complaint charged that the same Provenzano Group principals and Executive Board aiders and abettors conducted and participated in the affairs of the Local 560 Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Five [later six] specific acts of racketeering activity were alleged.

The Complaint also alleged that all of the defendants had conspired to violate § 1962(b) and § 1962(c), in violation of 18 U.S.C. § 1962(d).

Plaintiff United States requested that the Court restrain the Local 560 Executive Board members, Salvtore Provenzano (then-President), Joseph Sheridan (Vice-President), Josephine Provenzano (Secretary-Treasurer), J.W. Dildine (then-Recording Secretary), Thomas Reynolds, Sr. (then-Trustee), Michael Sciarra (then-Trustee and now President), and Stanley Jaronko (Trustee), from acting in any official capacity on behalf of Local 560; restrain the

"Provenzano Group" defendants, Anthony Provenzano, Nunzio Provenzano, Stephen Andretta, Thomas Andretta and Gabriel Briguglio, from having any dealings with any officers or employees of Local 560; order the appointment of a trustee to exercise the duties of the Excutive Board for an unspecified period of time (presumptively eighteen months under the District Court's opinion, App. B), at the conclusion of which a general election of new officers would be held under certain terms and conditions; and prohibit all the individual defendants from having any future dealings with Local 560 after such election.

Prior to trial, the United States District Court for the District of New Jersey denied the petitioners' motion to dismiss Paragraph 12(a) of the Complaint for failure to state a cause of action. (App. A) Individual "Provenzano Group" defendants Anthony Provenzano, Nunzio Provenzano and Thomas Andretta, all in prison, entered into consent judgments barring them from any future dealings with Local 560 or its Pension and Welfare Fund.

The case proceeded to trial before the Hon. Harold A. Ackerman, without a jury, on fifty-one consecutive days between January 25 and May 17, 1983. The defendants who participated in the trial were Local 560 and its Executive Board members, the petitioners herein, as well as the Trucking Employees of North Jesey Welfare Fund, Inc., and "Provenzano Group" defendants Stephen Andretta and Salvatore Briguglio, the latter two acting *pro se*. On February 8, 1984 the District Court issued a lengthy opinion (App. B) followed by a judgment order (App. C), granting most of the relief sought by the United States but staying implementation of the order pending appeal.

The District Court's factual analysis, recited with approval by the Third Circuit in its opinion affirming the

judgment on December 26, 1985 (App. D), concentrated on the misdeeds of the "Provenzano Group" defendants and then strained to include in its sweep the Executive Board of Local 560. The Court found that between the late 1940's and the time of trial, Anthony Provenzano was the leader of a group of individuals, the so-called "Provenzano Group," associated together as an enterprise, 18 U.S.C. § 1961(4). The Court further found that from the late 1950's into the 1970's, Anthony Provenzano ran the union "whether in or out of prison or office," and that his brothers Sam and Nunzio Provenzano "played musical chairs in minding the store for Tony to satisfy the technical requirements of the law." (App. B) The Court detailed the "pattern of criminal and other improper acts" engaged in by the Provenzano Group, the object of which was to gain control over and to exploit the Local 560 Enterprise. (App. B) The conclusion (scores of pages later): a finding that the necessary result of these acts was the extortion of LMRDA rights of Local 560 members, who must necessarily be afraid of Provenzano Group members and associates because "it is beyond belief that 10,000 members would sit by and watch these things done and never utter a peep." (App. D) [1]

[1]This was the testimony of the expert witness noted earlier, Professor Clyde Summers, an educator in the area of Labor Law. He opined that "a significant proportion of Local 560's rank and file were induced by fear of the Provenzano Group [not the Executive Board members] to surrender their membership rights." (App. D at ____) This homemade psychological analysis, clearly outside the area of Summers' expertise, was based on his inability to think of any reason other than fear which would explain the memberships failure to protest the various acts of the Provenzano Group members – assuming they knew about them. The Circuit Court agreed with Professor Summers on the ground that "[t]here seems to be no other plausible explanation." (App. D at ____) Other plausible explanations were in fact given by the defendants' expert witnesses, whose testimony was not rejected, discounted, or discredited; it was just ignored.

The major problem faced by the District Court in its factfinding: having found at lavish length that the members of the Provenzano Group were guilty of conduct constituting Hobbs Act violations, specifically, murder and extortion of union members' LMRDA rights, how to find the current Executive Board members of Local 560 guilty as well – most of whom were not in office during the relevant time periods of the alleged extortionate acts? (As noted, the Provenzano Group activities dated from the 1940's. Petitioners Joseph Sheridan and Josephine Provenzano were appointed to the Executive Board in 1978, petitioners Michael Sciarra and Stanley Jaronko were appointed in 1981.)

The Court found that the Board members were guilty of aiding and abetting the extortion of members' LMRDA rights, 18 U.S.C. § 2, by virtue of their "appointment and retention in ofice of certain officials of Local 560 and in their discharge of certain other duties," (App. A) later specified to consist of (once again) their appointment and retention in office of individuals having criminal records; expenditure of Local 560 assets in the payment of back salary and pension monies to Antony Provenzano after he had been incarcerated, notwithstanding the fact that the membership had voted to pay these monies; and their reckless indifference ot the persistent and systematic misconduct of fellow incumbent officers" with respect to (once again) unsuitable appointments to office, permitting known criminals to have access to the union's offices, and (once again) a pattern of non-beneficial expenditures of Local 560 assets to pay back salary and pension monies to Anthony Provenzano. As the Court of Appeals summed up the total case against these petitioners, the sole remaining members of the Executive Board:

> . . . Michael Sciarra and Stanley Jaronko, the most recent members of the Executive Board, aided and abetted in at least two predicate Hobbs Act extortions. For example, Antony Provenzano's pension payments, which represented a Hobbs Act extortion, extended through 1981. Each Executive Board member, *by not objecting to* these payments which did not benefit the union, necessarily aided and abetted in the extortion. During that time period, both Sciarra and Jaronko were on the Executive Board.
>
> In addition, in 1981, the Executive Board appointed Robert Luizzi to the position of Business Agent – notwithsanding Luizzi's criminal record. The district court held that Luizzi's appointment, and similar appointments, also constituted part and parcel of the extortion of membership rights under the Hobbs Act. Further, in 1981, the Executive Board refused to remove Nunzio Provenzano from office, despite the fact that he had been convicted in the City-Man case. As noted, during this period, the four members of the Executive Board who the defendants claim did not aid and abet the extortionate activities found by the district court, were active members of the Board.
>
> Thus, each individual Executive Board member has aided and abetted in at least two predicate acts . . . .

(App. C emphasis supplied).

None of these acts dsignated by the Court of Appeals is unlawful. The appointment of Luizzi as business agent and the retention of Nunzio Provenzano in office were in full compliance with LMRDA, 29 U.S.C. 504 (App. I)

and the failure to protest continuing payment of salary and bonus monies to Anthony Provenzano was *at best* a violation of the fiduciary duties imposed by LMRDA, 29 U.S.C. 501(a), not a crime.

But on this evidence the Executive Board petitioners were found to have aided and abetted Hobbs Act violations, and as "racketeers" were ordered to surrender their offices in Local 560.

Petitioners urge this Court to read the opinions of the courts below (App. B and C), which demonstrate – as no petition with a 30-page limitation could ever do – that the Executive Board defendants simply "went down with" the Provenzano Group defendants, in a fashion which cannot withstand factual or legal analysis.

ARGUMENT

I.

This case presents a question of enormous importance for the federal judicial system in this country: the standard of proof to be applied in civil actions brought pursuant to § 1964 of the Rocketeer Influenced and Corrupt Organization Act of 1970, 18 U.S.C. § 1961 *et seq.* [RICO]. The statute itself is conspicuously silent on this point, and it is widely agreed that its legislative history does little to resolve the question. *See* Towers, *Burden of Proof in RICO Actions: Does 'Sedima' Provide Guidance*? The National Law Journal, Dec. 2, 1985 at 26, Col. 1; Strafer, Massumi & Skolnick, *Civil RICO in the Public Interset; Everybody's Darling,* 19 Am.Crim. L. Rev. 655, 715 (1982). *See generally Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 390 (7th Cir. 1984), *aff'd,* ____ U.S. ____, 105 S.Ct. 3291, 878 L.Ed.2d 437 (1985) ("the

legislative history includes relatively little material on RICO's private civil remedy"); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 492 (2d Cir. 1984), *rev'd*, ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (referring to "[t]he clanging silence of the legislative history"). This legislative omission has not been cured by the reported decisions discussing the burden of proof in civil RICO actions, which are few in number and limited in analysis. Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO,* The National Law Journal, Oct. 10, 1983, at 3, Col. 3. *See, e.g., United States v. Cappetto,* 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2 395 (1975). This question must be answered in the near future, and this case provides a proper vehicle for doing so.

RICO was enacted in 1970 to combat organized crime. *Russello v. United States,* 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17, 26 (1983). During the first half of the ensuing decade, little use was made of its unique criminal and civil provisions. *See* 1 K. Brickey, Corporate Criminal Liability, § 7:01 at 230 n.5 (1984) ("[p]rior to 1975 there were only six reported RICO [criminal] cases"); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest; "Everybody's Darling,"* 19 Am.Crim.L. Rev. 656 (1982) ("For years, this provision remained a wallflower, but recently, use of the civil provision has slowly begun to pick up momentum."), *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, ____ n.1, 105 S.Ct. 3275, ("of 270 district court RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970's").

Since 1975, however, literally thousands of civil plaintiffs have discovered the advantages of casting their complaint in the form of a civil RICO action. *See* Towers,

Burden of Proof in RICO Actions: Does 'Sedima' Provide Guidance? The National Law Journal, Dec. 2, 1985 at 26 n.3. Given the liberal damages which can be recovered in a civil RICO action, there is no reason to believe that plaintiffs will not continue to bring civil RICO actions in ever-increasing numbers in the foreseeable future. *See* 18 U.S.C. § 1964 (c) ("[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee")' *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, ____, n.2, 105 S.Ct. 3275 ____ n.2, 87 L.Ed.2d 346, 376 n.2 (1985) (Powell, J., dissenting) ("RICO's provision for treble damages [constitutes] an enticing invitation to litigate [common law] claims in federal courts"). As Justice Marshall observed in his dissenting opinion in *Sedima:*

> In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can . . .

87 L.Ed.2d at 363-64.

Despite the large and ever-growing volume of civil RICO suits, the burden of proof required in these actions remains an open question. The confusion over this issue is due in part to the fact tht the decisions of this Court concerning evidentiary burdens in civil proceedings have not been entirely consistent. In *Addington v. Texas,* 441 U.S.

418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323, 329 (1979), the Court explained that:

> The function of a standard of proof . . . is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions . . ." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

The Court went on to say that the preponderance standard, which lies at one end of the evidentiary spectrum, is applied in

> the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance . . . The litigants thus share the risks of error in roughly equal fashion.

Id. The "reasonable doubt" standard, which occupies the other end of the spectrum, is applied in criminal cases, because

> the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.

Id. (Footnote omitted) Regarding the intermediate standard of "clear and convincing proof," the Court observed that:

> *One typical use of [it] is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.* The interests at

> stake in those cases are deemed to be more substantial than mere loss of money and *some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.* Similarly, this court has used the "clear, unequivocal and convincing" standard to protect particularly important individual interests in various civil cases.

Id. at 424, 60 L.Ed.2d at 330 (emphasis supplied). Although the Court's language discussing the "clear and convincing evidence" standard would seem to call for the use of that standard in civil RICO actions, where a plaintiff cannot recover unless the denfendant has been guilty of criminal misconduct, *see also Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("due process requires that the state support its allegations by at least clear and convincing evidence" in a proceeding initiated by the state to terminate the rights to natural parents to retain custody over their children), there is also support, as noted by the Court of Appeals in this case (App. D), for using the "preponderance of the evidence" standard. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983); *Steadman v. Securities and Exchange Comm'n,* 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981); *Vance v. Terrazas,* 444 U.S. 252 (1980), *S.E.C. v. C.M. Joiner Leasing Corp.* 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943); *United States v. Regan* 232 U.S. 37, 48-49, 34 S.Ct. 213, 58 L.Ed. 494 (1914) ("proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution").

Adding to the confusion, in *Sedima, S.P.R.L. v. Imrex Co., Inc.,* ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346, 356 (1985), although the Court specifically declined

to determine the relevant burden of proof in civil RICO actions, it seemed to suggest that the criminal standard might apply in private treble damage actions:

> . . . [R]equiring conviction of the predicate acts would not protect against an unfair imposition of the "racketeer" label. If there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of *fraud* beyond a reasonable doubt. *Finally, to the extent an action under* § 1964(c) might be considered quasi-criminal, requiring protections normally applicable to criminal proceedings, cf. One 1978 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 14 L.Ed.2d 170, 85 S.Ct. 1246 (1965), the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions.

(emphasis supp;lied as to last sentence).

The difficulty in determining the appropriate burden of proof, and thus the need for judicial guidance, is exacerbated by the unique nature of the RICO provisions. Although actions pursuant to 18 U.S.C. § 1964 are denominated as civil actions, in many ways they are more akin to criminal proceedings. The treble damageds allowed under § 1964(c) may be much higher in many cases than the fines authorized in criminal proceedings under the same statute. Moreover, defendants in a civil RICO action will be tarred with the stigma of being "racketeers" regardless of whether they have any affiliation with organized crime. Most importantly, however, there can be no civil liability under RICO *unless* the defendant has engaged in activity for which he could be held *criminally* liable under § 1962. *See* 18 U.S.C. § 1964(a) & (c). This

in itself sets RICO actions apart from other civil proceedings.

This court should act soon to clarify the burden of proof in civil RICO actions. Literally thousands of RICO actions are now approaching trial, *see* Towers, *Burden of Proof In RICO Actions: Does 'Sedima' Provide Guidance?* The National Law Journal, Dec. 2, 1985 at 26 § n.3, and more are being filed every day. Given the unique nature of the RICO statute, and the absence of any meaningful guidance in the legislative history, the district courts will undoubtedly arrive at different conclusions concerning the applicable burden of proof. *See United States v. Cappetto,* 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2d 395 (1975) (preponderance); Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO,* The National Law Journal, Oct. 10, 1983 at 21, Col. 1 (suggesting appropriateness of "clear and convincing evidence" standard for the requirement that a civil RICO plaintiff prove a "pattern of racketeering activity"); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: Everybody's Darling,* 19 Am.Crim.L.Rev. 655, 715-18 (1982) (arguing that a "clear and convincing" standard would be appropriate for all elements of a civil RICO action); *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 741 F.2d 482, 501 (2d Cir. 1984), *rev'd* 473 U.S. ____, 87 L.Ed.2d 346, 105 S.Ct 3291 (1985) (dictum) ("in the absence of previous convictions a civil plaintiff must carry a burden equal to that in a criminal case in proving [the defendant's] criminal conduct"). And even if a uniform rule should emerge, there is no guarantee that it will reflect the proper burden of proof to be applied in these cases. If the standard is too high, plaintiffs by the score will suffer as a result. If the standard is too low, hundreds, if not thousands, of defendants

will suffer unnecessary and improper exposure to potentially crushing awards of treble damages and the pejorative label of "racketeer."

Delay in determining the relevant burden of proof also works to the serious disadvantage of the federal judiciary. Ambiguity concerning one of the most fundamental legal questions in every RICO action encourages motions and appeals which will increase the congestion of the federal courts. Moreover, such basic uncertainty undermines the incentive to settle such cases out of court. How can parties evaluate their chances of success at trial when they do not even know what standard of proof will be required, the mere "preponderance of evidence" standard used in most civil actions, the stringent standard of "guilt beyond a reasonable doubt" applied in criminal actions, or some intermediate standard, perhaps "clear and convincing evidence"?

The case at bar presents an excellent opportunity to resolve this question in the near future. The issue is clearly presented, and has been properly preserved at every level of litigation. The case also provides a good vehicle for establishing guidelines because it presents the question addressed in the least virulent of civil actions — when no treble damages are sought. For these reasons, the court should grant certiorari in this case.

II.

Paragraph 12(a) of the Complaint filed in this case alleged that the defendants had unlawfully acquired and maintained, both directly and indirectly, an interest in and control of union Local 560, an "enterprise," through a pattern of racketeering activity in violation of § 1962(b) of the Racketeer Influenced and Corrupt Organization Act

of 1970, 18 U.S.C. § 1961 *et seq.* [RICO]. This racketeering activity allegedly involved murder and the systematic use of extortion, with the latter consisting of "the wrongful use of actual and threatened force, violence and fear of physical and economic injury in order to create within Local 560 a climate of intimation which induced the members thereof to consent to the surrender of certain valuable property in the form of their union rights as guaranteed by the provisions of Sections 157 and 411 of Title 29 of the United States Code." *United States v. Local 560, Int.; Bhd. of Teamsters,* 581 F.Supp. 279, 284 (D.N.J. 1984) (App. A) (quoting from the Complaint).

The conduct alleged in the compliant was clearly covered by the provisions of § 530 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C 401 *et seq.* [LMRDA],[2] which states in pertinent part that:

> It shall be unlawful for any person through the use of force or violence, or threat of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter.

A violation of § is not a predicate offense for purposes of establishing a RICO violation. *See* 18 U.S.C. 1961 (1). *Cf. United States v. Malizia,* 720 F.2d 744 (2d Cir. 1983)

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[2] *See United States v. Williams,* 624 F.2d 75 (9th Cir. 1980); *United States v. Kelly,* 545 F.2d 619 (8th Cir. 1976), *cert. denied,* 430 U.S. 933 (1977); *United States v. Roganovich,* 318 F.2d 167 (7th Cir.), *cert. denied,* 375 U.S. 911 (1963); *United States v. Bertucci,* 333 F.2d 292 (3d Cir.), *cert. denied,* 379 U.S. 839 (1964); *Tomko v. Hilbert,* 288 F.2d 625 (3d Cir. 1961).

(N.Y. Penal Law § 180.50 creates a misdemeanor which is not a RICO predicate crime).

Arguing that § 530 was the only provision of law prohibiting their alleged misconduct, the defendants filed a 12(b)(6) motion seeking dismissal of paragraph 12(a) of the complaint. This motion was denied on November 12, 1982, on the ground that the alleged extortion, if proved, constituted a violation of the Hobbs Act, 18 U.S.C. § 1951. *See United States v. Local 560, Int'l Bhd. of Teamsters,* 550 F. Supp. 511 (D.N.J. 1982) (App. A) The subsequent finding of Hobbs Act violation by the defendants were upheld on appeal by the United States Court of Appeals for the Third Circuit. *United States v. Local 560, Int'l Bhd. of Teamsters,* 780 F.2d 267 (3d Cir. 1985) (App. D)

This case involves the first[3] reported decision addressing the question of whether the basic rights of union members guaranteed under the LMRDA constitute extortable property for purposes of the Hobbs Act, which defines the criminal offense of extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). This is a question of considerable importance, because the answer determines what criminal sanctions can be invoked against those who use force or the threat of force to intimidate union members in the exercise of their rights under the LMRDA: the relatively mild sanctions authorized by the

[3]This issue was subsequently considered in *Rodonich v. House Wreckers Union,* Civ. No. 82-5583 (S.D.N.Y. Nov. 7, 1985) (available Feb. 25, 1986, on WESTLAW, QDCT file), also holding that the intangible rights guaranteed by the LMRDA constitute property for purposes of the Hobbs Act.

LMRDA itself, 29 U.S.C. § 530, or the much harsher penalties of the Hobbs Act and RICO as wsell.

Anyone who willfully violates § 530 of the LMRDA can be fined up to $1,000.00, or imprisoned for up to one year, or both. The maximum penalties for violations of the Hobbs Act are much higher – fine up to $10,000.00, imprisonment up to 20 years, or both. 18 U.S.C. § 1951(a). In addition, since violations of the Hobbs Act are predicate offenses for RICO, *see* 18 U.S.C. § 1961(1), the commission of two or more violations of the Hobbs Act can result in criminal and civil liability under the latter statute.

Criminal penalties under RICO include fines of up to $25,000 and sentences of up to 20 years. 18 U.S.C. 1963(a) These are among the harshest penalties in the criminal code. Blakey & Goldstock, *"On the Waterfront:" RICO and Labor Racketeering,* 17 Am.Crim.L.Rev. 341, 349 (1980); *see* Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970,* 83 Yale L.J. 1491, 1493 n.16 (1974). Their severity is enhanced by the fact that most of the circuit courts have held that it is permissible to impose cumulative punishment for both RICO violations and the underlying predicate offenses. *See United States v. Truglio,* 731 F.2d 1123, 1230 (4th Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 197 (1984); *United States v. Sutton,* 700 F.2d 1078, 1081 (6th Cir. 1983); *United States v. Greenleaf,* 692 F.2d 1982, 189 (1st Cir. 1982), *cert. denied sub nom Bratton v. United States,* 460 U.S. 1069 (1983) and *Greenleaf v. United States,* 460 U.S. 1069 (1983); *United States v. Hawkins,* 658 F.2d 279, 287 (5th Cir. 1981); *United States v. Dean, 647 F.2d 779, 785 (8th Cir. 1981), cert. denied,* 456 U.S. 1006 (1982); *United States v. Boylan,* 620 F.2d 359, 361 (2d Cir.), *cert. denied,* 449 U.S. 833 (1980); *United States v. Allman,* 609 F.2d

298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied sub nom Little v. United States*, 445 U.S. 946 (1980). *See also United States v. Black*, 759 F.2d 71, 73-4 (D.C. Cir. 1985) ("government may try a defendant for RICO violations based, in part, on an offense for which he has already been convicted". Finally, the RICO Act also provides for a broad spectrum of civil remedies including private treble damage actions and restraining orders such as those issued in the present case. 18 U.S.C. § 1964(a) & (c). Thus the decision in this case, affirmed by the Court of Appeals, that intimidation of union members in the exercise of their union rights can be prosecuted under the Hobbs Act, makes possible levels of punishment several times higher than the penalties authorized by LMRDA, 29 U.S.C. § 530.[4]

The legislative history of LMRDA makes it very clear, however, that Congress did not intend for such harsh penalties to be available for punishing the misconduct prohibited by § 530. Prior to the enactment of LMRDA, there was considerable disagreement over what should be viewed as criminal conduct and what criminal sanctions should be authorized by the proposed legislation. When the differences were finally resolved, § 530 emerged as a section

[4]The ability to charge an offense under RICO may enable prosecutors to obtain easier verdicts, as well as heavier sentences. According to one writer, the advantages of charging a RICO violation include "the prejudicial effect on judges and juries resulting from the use of the pejorative term 'racketeering' in RICO indictments." Tarlow, *RICO: The New Darling of Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 170 (1980). *See United States v. Anderson, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980), cert. denied*, 450 U.S. 912 (1981) (court reviewed RICO counts, even though convictions on other counts with concurrent sentences were affirmed, "because of the possible stigma stemming from the connotations surrounding the offense of 'racketeering.' ").

creating a misdemeanor rather than a felony. In discussing the report of the Joint Conference Committee, Congressman Udall explained the reasons for this policy decision:

> Criminal penalties for forceable interference with rights guaranteed by the act: This was a major dispute between the supporters of the Elliott and Landrum-Griffin bills during floor debate. It was the contention of the backers of the Elliott bill that the Landrum-Griffin penalties were so stringent that they might deter honest men from seeking and holding union office. We argued that the rights conferred by the act were so numerous and varied that in most instances the penalty did not fit the crime with the result that this sanction would be both harsh and unworkable. Our argument on this point prevailed and the Landrum-Griffin bill was quietly amended so that the drastic felone penalty was reduced to a misdemeanor. This solution was then adopted by the conference report.

105 Cong Rec. 18, 135 (1959).

Also illuminating is Representative Griffin's analysis of two sections of the Landrum-Griffin bill which were eventually adopted as sections 529 and 530 of the LMRDA:

> Section 609 of the substitute provides a civil — not a criminal — remedy, enforcible by the Secretary of Labor, to protect a union member from suffering a fine, suspension, or expulsion because he dares to exercise a right guaranteed under the act. A comparable provision in the Senate — passed bill — section 607 (a), approved by a 90-to-1 vote — would make it a crime for a union official to fine, suspend, or otherwise discipline a union member for exercising his

> rights. *In putting our substitute together, we decided to temper the remedy in this instance because we felt that the conduct proscribed was roughly comparable to activity under the National Labor Relations Act.*
>
> Section 610 of our substitute – comparable to section 607(b) of the Senate bill – would make it a criminal offense for any person – whether he be union official or an employer, or anyone else – to use force or violence, or threats thereof, willfully for the purpose of depriving any union member of a right guaranteed to him by the act.

105 Cong.Rec. 15, 530 (1959) (emphasis supplied). Once again, the concern of the drafters to avoid over-kill in the sanctions which they authorized is plainly apparent from the quoted language.

Given the legislative history of § 530, it is clear that this LMRDA provision was meant for punishing the extortion of union rights through force or threat of force. More general extortion statutes such as the Hobbs Act were simply not intended to apply in cases such as the one at bar. *Cf. Preiser v. Rodriguez,* 411 U.S. 475 (1973) (when prisoners challenge the fact of existence of confinement, their rights are controlled by the federal habeas corpus statute, rather than the more general provisions of 28 U.S.C. § 1983). "[T]he principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . . has special cogency where a court is called upon to determine the extent of punishment to which a criminal defendant is subject for his transgressions." *Simpson v. United States,* 435 U.S. 6, 15 (1978); *see also United States v. Bates,* 429 F.2d 557, 559 (9th Cir. 1970).

The decision in this case permitting LMRDA violations

to be chargeable under the Hobbs Act, if not reversed, will drastically alter the nature of the penalties which can be imposed as punishment for the misconduct prohibited by 2 U.S.C. § 530. Such drastic change will thwart the clear intent of Congress, in drafting the LMRDA, to strike a delicate balance between providing adequate punishment for transgressions and discouraging rank and file union members from seeking union office by the threat of harsh and unworkable sanctions. For these reasons, the Court should grant certiorari in this case.

III.

The third and fourth issues in this case present a common question: can acts which are lawful under LMRDA, standing alone, constitute the factual basis for a finding that the actors aided and abetted in Hobbs Act violations committed by the principals?

As noted earlier, the Court of Appeals held that the Executive Board members had each aided and abetted the commission of two such violations, by virtue of their appointment of Robert Luizzi (a convicted felon) to the office of business agent in 1981, their failure to take immediate steps to remove Nunzio Provenzano from union office upon his conviction of a union-related offense in 1981, and their failure to object to the continuing payments of pension monies to Anthony Provenzano from 1979 to 1982 (the pension to Provenzano having been voted on by the Local 560 membership at a regular membership meeting held in 1976, and payments begun when Provenzano permanently retired from the union in 1978 as a result of his incarceration on a murder charge.

The Board members' appointment of Luizzi was in full compliance with LMRDA 29 U.S.C.A. § 504; Luizzi's only

criminal convictions, for felonious assault and battery and felonious breaking and entering, occurred in 1945 and 1949 repectively. Thus there was clearly no statutory disability barring him from union office in 1981.

The Board members' failure to immediately remove Nunzio Provenzano from office upon his conviction of a crime in 1981 was also in full compliance with § 504; Provenzano had not yet been sentenced, and had not yet pursued his right of appeal, during the brief period of time involved here. (Provenzano's post-conviction bond was conditioned on his resignation from union office, making his post-conviction "retention period" a short one.) But again, during that brief period of time there was clearly no statutory disability barring him from office.

The continuing pension payments to Anthony Provenzano were made pursuant to the union membership's vote awarding him such pension, upon motion made and unanimously passed at a regular memberhsip meeting held in 1976. That Provenzano was incarcerated at the time he was paid his pension is hardly relevant to whether he was entitled to receive these monies. *See Winer v. Edison Brothers Stones Pension Plan,* 593 F.2d 307 (8th Cir. 1979) (legislative history of ERISA, 29 U.S.C. § 1001 *et seq,* shows clearly that Congress intended to severely restrict "bad boy" clauses in pension plans). Thus there was no statutory impediment under LMRDA, 29 U.S.C. § 501(a), to the Executive Board's payment of Provenzano's pension, when the pension had been authorized by the union membership, did not violate the union's constitution, by-laws and resolutions, and did not result in personal gain to the Board members. *McNamara v. Johnston,* 522 F.2d 1157, 1163-64 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976).

But even assuming *arguendo* that there was a § 501(a) failure of fiduciary responsibility on the part of the Executive Board, there is no suggestion by either the District Court or the Court of Appeals as to how this would translate into a Hobbs Act violation. Indeed, one may not be convicted of an LMRDA criminal violation, 29 U.S.C. § 501(c) merely because he has breached his civil fiduciary duties. *U.S. v. Snyder,* 668 F.2d 686, 691 (2nd Cir. 1982).

These combined issues are very fact specific, requiring a close reading of the opinions of the Courts below (App. B and D), but are also significant federal issues which have not been decided by this Court and are likely to recur in the highly charged arena of RICO litigation involving labor unions. The case at bar presents an excellent opportunity to resolve the issues of whether the acts of union officers which are lawful under LMRDA, §§ 501(a) and § 504, can constitute acts of aiding and abetting an extortion of LMRDA rights under § 411, chargeable under RICO.

CONCLUSION

For all of the reasons set forth herein, this Court should

CONCLUSION

For all of the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, and should resolve these issues which are of fundamental importance to the federal judicial system.

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PROOF OF SERVICE

I, Barbara H. Fleisher, counsel of record for the petitioners herein, do hereby certify and acknowledge that three (3) copies of the within "Petition for Writ of Certiorari" were served upon the following individuals, at the addresses indicated, by first-class mail, postage prepaid, this 28th day of February, 1986:

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